PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BANKRUPTCY.

The United States Circuit Court of Appeals, Fifth Circuit, decides in *B. F. Roden Grocery Co.* v. *Bacon*, 133 Fed. 515, that where a creditor of a bankrupt holds a written waiver of exemptions, which is permitted by the law of the state, the court of bankruptcy should not, on application of the bankrupt, enjoin him from prosecuting an attachment suit in a state court against property claimed by the bankrupt as exempt, in any event not longer than until the property shall have been set aside as exempt by the trustee, the validity of the waiver being a matter immaterial to the court of bankruptcy, and one for the state court to determine.

Proceedings in State Court

The United States District Court (N. D. New York) decides *In re Levey*, 133 Fed. 572, that a trustee in bankruptcy is a "party in interest" within the meaning of the Bankruptcy Act of 1898, and may file and prosecute specifications of objection to the bankrupt's discharge so long as he is claiming and seeking to recover property or money from the bankrupt alleged to belong to the estate and to be wrongfully withheld or concealed.

Discharge

The United States District Court (E. D. Missouri) decides *In re E. J. Arnold & Co.*, 133 Fed. 789, that creditors of bankrupts who advanced money to them on the strength of their fraudulent representations that they were earning sufficient profits to pay a stipulated weekly interest, that they were solvent and responsible and had on hand sufficient money to pay all their depositors the amount of their deposits, and that they did not pay dividends out of receipts, may prove up their claims in bank-

Gambling Transactions

BANKRUPTCY (Continued).

ruptcy proceedings, although they knew and intended that the money which they advanced to the bankrupts would be used in gambling ventures.

Distress for Rent

The United States District Court (N. D. Pennsylvania) decides *In re Lines*, 133 Fed. 803, that where, after distress by a landlord, the tenant is adjudicated a bankrupt, the necessary effect is to put the property under the control of the bankruptcy court, which will stay further proceedings with the distress, and require the landlord to submit his rights to that court for adjudication.

BANKS.

Wrongful Loans

In *Western Bank of Louisville* v. *Coldewey's Ex'x*, 83 S. W. 629, the Court of Appeals of Kentucky decides that where the president of a bank wrongfully permitted his son to overdraw his account, and thereafter the son made a deed of trust for the benefit of his creditors, and the bank, together with other creditors, agreed in consideration of the conveyance to look only to the assets so conveyed for the satisfaction of its claims against the son, the bank was not estopped from bringing an action against the estate of the president for loss sustained by his breach of trust in permitting the overdrafts.

BILLS AND NOTES.

Judgment Note: Execution in Blank

In *Smith* v. *Willing*, 101 N. W. 692, the facts were as follows: A note was executed in Illinois on a printed form containing a single blank after the words "pay to the order of" and followed by the word "dollars." In this blank the words "twenty-five hundred" were inserted so as to leave no space in front of them for the name of the payee. The note contained also a provision for confessing judgment in favor of the holder. The attorney for the holder inserted his name by interlining it between the words "pay to the order of" and the words "twenty-five hundred," and thereupon took judgment in Illinois in his favor by confession. Suit was brought on this judgment in Wisconsin, where the Supreme

BILLS AND NOTES (Continued).

Court held that such judgment might be attacked on the ground that the note was not negotiable in view of the omission of the name of the payee, but was subject to any defences that might have existed between the original parties thereto, and there being such defences in this case the holder ought not to have been permitted to recover. Two judges dissent. Compare *Atkinson* v. *Foster*, 134 Ill. 472.

CARRIERS.

Lien: Demurrage Charges

It is held in *Southern Ry. Co.* v. *Lockwood Mfg. Co.*, 37 S. 667, that where a railway ran a car on to a siding so that a consignee might unload the same, this was not such an absolute delivery to the consignee as to preclude the carrier from later asserting his lien on the consignment to protect himself as to demurrage charges where such car was not unloaded within the time limit, and where under the contract of shipment the carrier was entitled to a lien for such charges. Compare *Miller* v. *Georgia, etc., Banking Co.*, 88 Ga. 563.

Assault by Servant

In *Reilly* v. *New York City Ry. Co.*, 91 N. Y. Supp. 319, it appeared that a passenger had left a street-car after being refused change by the conductor, and later, while waiting in the station of the defendant's street-railway company, had spoken to the conductor about the matter, whereupon the conductor had assaulted him. He then brought suit against the company, but the court denies him a recovery on the ground that his relation to the company as passenger had ceased and the conductor was not acting within the scope of his authority in committing the assault. Compare *Stewart* v. *Brooklyn and Crosstown Ry. Co.*, 90 N. Y. 388.

Refusal of Passenger

The Supreme Court of Mississippi decides in *Illinois Cent. R. Co.* v. *Smith*, 37 S. 643, that a common carrier of passengers may refuse transportation to a person who, on account of physical or mental disability, is likely to require attention from the carrier or the passengers and to be unable to take care of himself, but where a person seemingly unable to take care of himself is known to the carrier to be, as a matter of fact, able to do so, he cannot be refused transportation. The reasonableness or

CARRIERS (Continued).

unreasonableness of the refusal of a passenger, it is held, is a question of fact to be decided by the jury. Compare *Zachary* v. *Railroad*, 75 Miss. 751, 41 L. R. A. 385.

Lien for Freight: Delivery

In *Lembeck* v. *Jarvis Terminal Cold Storage Co.*, 59 Atl. 360, it appeared that a carrier delivered goods to a consignee upon the promise of the consignee to hold them until the freight should be paid. The consignee, however, delivered the goods to a third party as pledgee, such third party having no knowledge of this agreement. The Court of Chancery of New Jersey decides that as against him the carrier had lost its lien, delivery to the consignee being sufficient as against all persons taking without notice to waive his lien, no matter what the secret agreement between himself and the consignee might have been. Compare *McFarland* v. *Wheeler*, 26 Wend. 467, 474.

CHRISTIAN SCIENCE.

Liability for Negligence

In *Spead* v. *Tomlinson*, 59 Atl. 376, the Supreme Court of New Hampshire deals with a suit brought to recover damages for unsuccessful treatment by one professing to be a Christian Science healer. The court, holding that standard of care by which such person is to be judged is the care, skill, and knowledge of an ordinary Christian Science healer and not that of an ordinary physician, decides that where a person has intelligently and voluntarily consented to follow the advice and abide by the result of the prayers of a Christian Science healer he cannot later recover damages for negligence based on the ground that public policy is opposed to such treatment. Compare *Goodyear* v. *Brown*, 155 Pa. 903, 20 L. R. A. 838.

CONSTITUTION.

Consideration of Provision

In *Norfolk and W. Ry. Co.* v. *Cheatwood's Adm'x*, 49 S. E. 489, the Supreme Court of Appeals of Virginia decides that where a constitutional provision of one state is incorporated in the constitution of another, the construction placed upon the provision by the courts of the former state before its adoption in the latter must be adopted by the courts of the latter state.

CONVERSION.

Where plaintiff had delivered to defendant a case containing merchandise to be transported by it, and defendant failed to deliver the goods and when asked for the return of the same claimed they had been lost, there is no conversion of such goods: New York Supreme Court, Appellate Term, in *Goldbowitz* v. *Metropolitan Express Co.*, 91 N. Y. Supp. 318. With this decision compare *Rubin* v. *Wells, Fargo Ex. Co.*, 85 N. Y. Supp. 1108.

Loss by Carrier

CORPORATIONS.

It is decided by the New York Supreme Court, Appellate Term, in *Harris* v. *Vienna Ice-Cream Co.*, 91 N. Y. Supp. 317, that where the president and secretary of a corporation had requested a physician to render professional services to two employees of the corporation, the corporation was not liable therefor in the absence of a showing that the services rendered were for the benefit of the corporation or in satisfaction of a claim, if any there might be against it. "Persons dealing with the officers of a corporation or with persons assuming to represent it are chargeable with notice of the purposes of its creation and its powers and with the authority, actual or apparent, of its officers or agents with whom they deal." *Wilson* v. *Kings County El. R. R. Co.*, 114 N. Y. 467.

Employment of Physicians

Intercorporate relations are constantly giving rise to perplexing questions, one of which appears in the decision of the Court of Chancery of New Jersey in *O'Connor* v. *International Silver Co.*, 59 Atl. 321. The statute of New Jersey forbids the stock of a corporation belonging to itself to be voted on. It is held in the case referred to that this prevents the directors of a corporation from voting stock of the corporation owned by another corporation of which the corporation in question has purchased all the capital stock. Compare *American Railway Frog Co.* v. *Haven*, 101 Mass. 398.

Voting Own Stock

CRIMES.

Acquittal

In re Stubbs, 133 Fed. 1012, the United States Circuit Court (D. Washington, W. D.) decides that where a United States soldier killed a fellow-soldier during a military encampment, and on being surrendered to the civil authorities of the state was prosecuted for murder and acquitted, such acquittal, though a final determination of his innocence of murder and of each lesser offence necessarily included therein, was no bar to his subsequent military arrest and trial by a general court-martial for "conduct to the prejudice of good order and military discipline," in violation of the sixty-second article of war, though such court-martial was based on the same act. Compare *Cross* v. *North Carolina*, 132 U. S. 139.

EVIDENCE.

Suppression: Presumptions

In *Stout* v. *Sands*, 49 S. E. 428, the Supreme Court of Appeals of West Virginia decides that suppression by one party to a suit of a document relied upon as evidence by the opposite party is not equivalent to an admission of the truth of the claim of the latter respecting its contents, and does not dispense with the necessity of prima-facie proof of such claim sufficient to sustain a judgment or decree. But when a prima-facie case is made, and doubt is cast upon it by rebuttal evidence or otherwise, suppression of the document raises a strong inference against the party failing to produce it and determines the point in favor of the other party. It is further held that though a party cannot impeach a witness called by him, he is not bound by all such witness says. He may prove the material facts by other evidence, even though the effect of it is to directly contradict his own witness, but he cannot show that the witness has made contradictory statements out of court. Compare *Wheeling* v. *Hawley*, 18 W. Va. 472.

FOREIGN CORPORATIONS.

Business within the State

The question as to what constitutes "doing business" within the meaning of the state statutes imposing restrictions or creating conditions on foreign corporations doing business within their boundaries is an interesting one, and one upon which the cases do not seem to have established a very broad and comprehensive basis on which the law may be developed.

FOREIGN CORPORATIONS (Continued).

This question is raised in the case of *American Contractor Pub. Co.* v. *Bagge*, 91 N. Y. Supp. 73. In that case a foreign corporation engaged in publishing a magazine in Illinois employed an agent in New York to solicit orders for advertisements. These orders were forwarded to Illinois for acceptance, and, if accepted, the advertisements appeared in the magazine. The New York Supreme Court, Appellate Term, holds that this does not constitute a "doing business" within the meaning of the New York laws requiring foreign corporations doing business in New York to obtain a certificate and pay a license tax. Compare *Jones* v. *Keeler*, 81 N. Y. Supp. 648.

FREIGHT RATES.

Misrepresentations

The Supreme Court of Texas decides in *Texas and P. Ry. Co.* v. *Mugg & Dryden*, 83 S. W. 800, that where certain shippers contracted for the sale of coal at a certain price, basing their price on the representations of the carrier's agent that the freight would be as stated by him, and, nevertheless, were compelled to pay a higher rate, the carrier is liable for damages occasioned by such misrepresentations notwithstanding the fact that the agent named a rate less than the rate posted in accordance with the interstate commerce law. Compare *Pond-Decker Lumber Co.* v. *Spencer*, 86 Fed. 846.

GAMBLING.

Slot Machines

In New York the liquor tax law prohibits gambling on the premises occupied by a pharmacist authorized to sell liquor. In *Cullinan* v. *Hosmer*, 91 N. Y. Supp. 607, the question arises whether a slot-machine in a drug-store, which was so arranged that a person who dropped five cents into it became entitled to at least one cigar, and possibly to three, said cigars being sold at five cents each, constituted gambling. The New York Supreme Court (Appellate Division, Fourth Department), with one judge dissenting, decides that it is not a form of gambling.

GAME.

State Ownership

It is held by the Supreme Court of Arkansas in *State* v. *Mallory*, 83 S. W. 955, that the state's ownership of fish and game is not such a proprietary interest as will authorize a sale thereof or the granting of special interest therein or license to enjoy, but is solely for the purposes of regulation and preservation for the common use, and is not inconsistent with a claim of individual or special ownership by the owner of the soil if it be found that there can be any such individual or special ownership. It is therefore decided that an act of the state purporting to protect the game and fish of the state and declaring it unlawful for any non-resident to game or fish at any season constitutes a violation of the constitutional prohibition against denying the equal protection of the law in so far as it prevents the same enjoyment of his property right by a non-resident landowner as is afforded a resident landowner. It is further held that the taking away of such right as a non-resident is without due process of law. Two judges dissent. Compare *Geer* v. *Com.*, 161 U. S. 519.

INSURANCE.

Breach of Warranty

In *Donley* v. *Glenn's Falls Ins Co.*, 91 N. Y. Supp. 302, the New York Supreme Court (Appellate Division, Fourth Department) decides, against the dissent of two judges, that where there is a breach of the usual warranty as to the title of land on which the insured building is located, such breach does not avoid the policy as to personalty which is situated in the building. The prevailing and dissenting opinions present a very satisfactory review of the decisions and of the questions involved. Compare *Pratt* v. *Dwelling House Mut. Fire Ins. Co.*, 130 N. Y. 206.

LANDLORD AND TENANT.

Constructive Eviction

In *Eschmann* v. *Atkinson*, 91 N. Y. Supp. 319, it is decided by the New York Supreme Court, Appellate Term, that the refusal on the part of the owner of an apartment to permit a colored servant to use the elevator in the apartment constituted a constructive eviction of the master of such servant under the facts of

LANDLORD AND TENANT (Continued).

that case, there not being sufficient evidence in the mind of the court to bring home to the defendant the existence of a rule that such servants should be excluded from the building. Compare *Doyle* v. *Lord*, 64 N. Y. 432.

LIMITATIONS.

The Supreme Court of South Carolina decides in *Devine* v. *Miller*, 49 S. E. 479, that an administrator by his promise in writing may renew a note of his intestate before it is barred so as to bind the personalty, but the real estate can only be affected by the promise of an heir to the extent of his interest. Compare *Bolt* v. *Dawkins*, 16 S. C. 211.

Promise of Administrator

LOCAL ACT.

In *Commonwealth ex rel Miller & Sons* v. *Brown*, 59 Atl. 479, the Supreme Court of Pennsylvania, although recognizing the general rule that a local act is not regarded as repealed by a general act on the same subject with inconsistent provisions, unless a contrary intent is clearly apparent, decides, however, that where a general act is passed to carry into effect a general mandatory provision of the state constitutions all acts inconsistent therewith, including local acts, are thereby repealed. Compare *Commonwealth* v. *Summerville*, 204 Pa. 300.

Repeal: General Law

MORTGAGES.

The Supreme Judicial Court of Maine, holding that although ordinarily the burden of proving the payment of a mortgage indebtedness is on the mortgagor, decides in *David* v. *Poland*, 59 Atl. 520, that it is otherwise in the case of a mortgage given for the support of the mortgagee where it is provided in the mortgage that the support shall be furnished the mortgagee upon the premises described in the mortgage. In such a case the implication is clear that it was the intention of the parties that the mortgagor should retain possession of the premises until a breach of the condition, because possession by him is absolutely necessary in order to enable him to perform the

For Support: Possession

MORTGAGES (Continued).

condition of the mortgage. In such a case the burden of proving that there has been a breach of the condition of the mortgage is upon the mortgagee or upon an assignee who seeks to recover possession of the premises. With this decision compare *Hadley* v. *Hadley*, 80 Me. 459.

Purchase at Judicial Sale

It is decided by the Supreme Court of Appeals of West Virginia in *Liskey* v. *Snyder*, 49 S. E. 515, that a purchase of real estate at a judicial sale by strangers to the proceeding, and contemporaneous resale thereof by them to the debtor by an executory contract in writing, whereby he is charged with a certain sum in addition to the amount for which it sold at the judicial sale, all in pursuance of a prior verbal contract, though in form a purchase of the land, is regarded in equity as a loan of money on the land as security, and the rights of the parties are determined by the principles governing the relation of mortgagor and mortgagee.

NEGLIGENCE.

Passenger on Running-Board

The tendency of the courts to create rules of law as to what does or does not constitute negligence in accident cases is continually appearing in the decisions. An illustration of this occurs in *Rosen* v. *Dry Dock, E. B. and B. R. Co.*, 91 N. Y. Supp. 333, where it is decided as a matter of law that a person who, because a car is crowded, stands on the running-board is guilty of contributory negligence, where he was injured by being struck by the shaft of a wagon, which other passengers had avoided by keeping close to the car or getting between the seats. It seems to be regarded as settled that where a passenger can find room to stand between the seats, even though these run latitudinally, it is negligent for him to ride on the running-board.

Gross Negligence

Decisions have frequently questioned the logical propriety of drawing a distinction between the so-called degrees of negligence, and the criticism upon such distinction seems to be entitled to respect. In *Rideout* v. *Winnebago Traction Co.*, 101 N. W. 672, the court lays down certain distinctions which may perhaps be

NEGLIGENCE (Continued).

of service in connection with the cases on this question. The term "negligence," it is said, by itself suggests only inadvertence or want of ordinary care, and however great may be the degree of such want of care, so long as the inadvertence remains, wilfulness is excluded. On the other hand, the court says the term "gross negligence" signifies wilfulness. It involves intent, actual or constructive, which is a characteristic of criminal liability. Gross negligence does not include ordinary negligence, and proof of the former does not prove, but rather disproves, the latter. In connection with this decision compare *Cleveland, etc., R. W. Co.* v. *Miller*, 149 Ind. 490, 501.

OYSTERS.

In *Vroom* v. *Tilly*, 91 N. Y. Supp. 51, the Supreme Court (Appellate Division, Second Department) decides that it is not necessary that a person who alleges ownership in certain oyster-beds should own the land on which they are situated, and the fact that he has been a trespasser at such place does not entitle the owner of the land as against him to take them for his own use, although he may compel the person who planted them to take them up, or although he might himself remove them as a nuisance. One judge dissents and the case is an interesting discussion of the point involved in view of the rather few decisions on this subject. Compare *Supter* v. *Van-Derbeer*, 47 Hun. 366.

Oyster Beds: Ownership

PHOTOGRAPHS.

In *Barb* v. *Oxford Paper Co.*, 59 Atl. 290, the Supreme Judicial Court of Maine decides that photographs, to be admissible as evidence, should simply show conditions existing at the time in question. When taken with men in various assumed postures, and things in various assumed situations, in order to illustrate the claims and contentions of the parties, they should not be admitted.

Admissibility

RAILROADS.

Several decisions have recently appeared as to the right of a public service corporation to condemn corporate stock.

Condemnation of Stock of other Roads

An important decision is handed down by the Supreme Court of Errors of Connecticut in *New York, N. H. and H. R. Co.* v. *Offield*, 59 Atl. 510, relating to this question. A law of Connecticut authorizes a railroad company which has acquired more than three-fourths of the stock of another railroad company and cannot agree with the holders of the outstanding stock for the purchase thereof, to condemn such stock on a finding that it would be for the public interest. It is held that such statute is constitutional, and that it is for the public interest that a railroad company should condemn the few shares of outstanding stock where it is contemplating extensive improvements and desires to use the credit of the road whose stock it wishes to condemn to raise funds for the improvements, it itself not possessing the credit necessary. Compare *Black* v. *Delaware and R. C. Co.*, 22 N. J. Eq. 130.

TAXES.

In *Penobscot Chemical Fibre Co.* v. *Inhabitants of Town of Bradley*, 59 Atl. 83, the Supreme Judicial Court of Maine decides that the value, as distinguished from valuation, of other similar property in the town similarly situated, as shown by the evidence of actual sales, or by the opinion of properly qualified witnesses, expressed in court, is admissible upon the question of true value. Compare *Manchester Mills* v. *Manchester*, 57 N. H. 309.

Assessment: Valuation

TOWNS.

The Supreme Judicial Court of Maine, laying down the general rule that in maintaining a police lock-up a town is pursuing, not a municipal purpose, but a public purpose, viz., the maintenance of the justice and peace of the state; and hence, in the absence of any statute imposing liability, the town is not liable for neglect of its selectmen in the care of it, holds in *Mains* v. *Inhabitants of Ft. Fairfield*, 59 Atl. 87, that the fact that a prisoner committed by a constable to a town lock-up suffered damage

Liabilities

TOWNS (Continued).

from its neglected condition does not make the town liable to an action therefor.

WATER-COURSES.

The Supreme Court of Appeals of West Virginia decides in *Uhl* v. *Ohio River R. Co.*, 49 S. E. 378, that overflow waters of a natural stream in times of ordinary flood or freshet flowing over or standing upon the adjacent lowlands do not cease to be part of the stream, unless and until separated therefrom so as to prevent their return to its channel.

Overflow

WILLS.

The Prerogative Court of New Jersey decides *In re Middleton's Will*, 59 Atl. 454, that without proof that a mistress influenced a testator directly in procuring a will in her favor, it cannot be inferred from their relation that she secured an influence over him which she would naturally and improperly exert to advance her interest. Compare *Arnault* v. *Arnault*, 52 N. J. Eq. 801.

Undue Influence

The statutory law of Wisconsin, like the statutory law of many other states, provides that a child born after the making of his parent's will, for whom no provision is made in the will, shall share in the estate as if the parent had died intestate, unless it appears from the will that the parent intended to make no provision for such child. Another statutory provision is to the effect that where children are adopted by legal proceedings, children so adopted shall be deemed, for the purposes of inheritance and all other legal purposes, the same as if they had been born in lawful wedlock. Construing these provisions, the Supreme Court of Wisconsin decides *In re Sandon's Will*, 101 N. W. 1089, that where a child had been legally adopted after her adoptive father had made his will she was entitled to share in her father's estate as if he had died intestate, where no mention of her or provision for her was made in his will. The court holds that for the purposes of these provisions the date of adoption of an adopted child is equivalent to the date of the birth of a parent's own child, nor can evidence be received

After-Born Children

WILLS (Continued).

to show that he intended to make no mention of such child unless the will is ambiguous or doubtful on its face. Compare *Bresee* v. *Stiles*, 22 Wis. 120.

Agreement to Bequeath: Specific Performance

In *Bush* v. *Whitaker*, 91 N. Y. Supp. 616, it appeared that an uncle wrote to his nephew, telling him that if there were no change in his family he would will him one-half of his property, and then went on to say, "You get me up a cane that will be good enough for you when I get through with it, and I will leave you the cane and one thousand dollars with it." The nephew secured a cane for his uncle, which the latter accepted and used for many years, but failed to leave the one thousand dollars to his nephew, bequeathing substantially all his property to an adopted daughter. The court holds that the nephew is entitled to specific performance of the contract. Compare *Owens* v. *McNally*, 113 Cal. 444, 33 L. R. A. 369, where an unmarried man contracted to give all his property to his niece if she would take care of him. Later he married and died without performing his agreement. The court refuses to enforce the contract on the ground that the rights of an innocent third party had intervened and hardship would result to the widow.